

AMERICAN PUNITIVE DAMAGES VS. COMPENSATORY DAMAGES IN PROMOTING ENFORCEMENT IN DEMOCRATIC NATIONS OF CIVIL JUDGMENTS TO DETER STATE-SPONSORS OF TERRORISM

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I. INTRODUCTION

*"There is considerable reason to believe that the civil justice system has substantial, underutilized potential in the war against terrorism."*¹

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The central consequence of the 2001 al-Qa'eda terror attack² on the United States of America was a fundamental

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¹ JOHN NORTON MOORE, *Introduction*, in CIVIL LITIGATION AGAINST TERRORISM 3, 5 (John Norton Moore ed., Carolina Academic Press 2004).

² U.S. H. PERMANENT SELECT COMM., AL-QAEDA: THE MANY FACES OF AN ISLAMIST EXTREMIST THREAT, H.R. REP. No. 109-615, at 8 (2006). Al-Qaeda finds its roots in the Salafi tradition, which is based on the extreme interpretation of Sunni Islam. *Id.* "Salafism is rooted in the belief that the Koran and the teachings of the Prophet Muhammad and his

legal shift in the approach that the United States and, to a lesser degree, other democratic nations³ have taken in regard to confronting international terrorism and the States that support terrorism.⁴ Damaged was the old law enforcement paradigm of pre-9/11 which emphasized international treaties focused entirely on criminalizing specific acts of terror by specific individuals.⁵ The new challenge of the post-9/11

companions are the most legitimate sources of religious conduct and reasoning, and as such should be emulated and put into practice in contemporary Islamic communities.” *Id.* Al-Qaeda has used this distorted interpretation of Salafi Islam to attract thousands of Muslims around the world to wage a war against the United States and the West. *Id.*

³ *Democracy’s Decline: Crying for Freedom*, ECONOMIST, Jan. 16, 2010, at 58-60. According to the lobby group Freedom House, the number of electoral democracies in the world stands at 116 out of the 192 nations in the United Nations. *Id.*

⁴ JEFFREY F. ADDICOTT, *TERRORISM LAW: MATERIALS, CASES, COMMENTS* 19-54 (5th ed., Lawyers & Judges Publishing Co. 2009) (describing the concept of the “War on Terror” and how America has shifted to the law of war in dealing with the radical al-Qa’eda group).

⁵ *Id.* at 59.

Some examples of specific antiterrorist conventions include: The Convention on Offenses and Certain Other Acts Committed on Board Aircraft (Tokyo Convention, 1963); Convention for the Suppression of Unlawful Seizure of Aircraft (Hague Convention, 1971); Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Montreal Convention, 1973); Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents (New York Convention, 1976-1977); and the International Convention Against the Taking of Hostages (Hostages Convention, 1979). *Id.* International Convention for the Suppression of Terrorist Bombings (1997); International Convention for the Suppression of the Financing of Terrorism (1999); International Convention for the Suppression of Acts of Nuclear Terrorism New York (2005); Convention on the Marking of Plastic Explosives for the Purpose of Detection (1991); Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf (1988); Convention for the Suppression of Unlawful Acts against the Safety

approach focuses on ways to effectively combat not only the al-Qa'eda-styled Islamic terrorists and groups, but the States that provide sponsorship or support to all forms of international terrorism, particularly the mega-Islamic terror groups.⁶ Apart from activities associated with killing, detaining, or prosecuting individual terrorists—whether they are labeled as enemy combatants or not⁷—this new thinking also demands the acceptance by fellow democracies of an internationally based functional legal methodology that can deter those rogue States that sponsor terrorism, like Iran, *ab initio*.⁸

In the United States, the new thinking by both the Executive and Congress encompassed the employment of a “law of war” model against a specific terror group—al-Qa'eda and their supporters, the Taliban. This model used the

of Maritime Navigation (1988); Protocol on the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation (1988); Convention on the Physical Protection of Nuclear Material (1980); Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (1971).

U.N.T.S., *Text and Status of the United Nations Convention on Terrorism*, http://treaties.un.org/Pages/DB.aspx?path=DB/studies/page2_en.xml&menu=MTDSG (last visited June 10, 2010).

⁶ U.S. Dep't of State, Office of the Coordinator for Counterterrorism, *Foreign Terrorist Organizations* (Jan. 19, 2010), available at <http://www.state.gov/s/ct/rls/other/des/123085.htm>. Hamas and Hezbollah have long been on the State Department's list of terror organizations. *Id.*

⁷ Jeffrey F. Addicott, *Efficacy of the Obama Policies to Combat Al-Qa'eda, the Taliban, and Associated Forces—The First Year*, 30 PACE L. REV. 340, 350 (2010). The term “War on Terror” was used by the Bush Administration to describe the ongoing international armed conflict between the United States of America and the “Taliban, al-Qa'eda, or associated forces.” *Id.* at 345-46. The Obama Administration generally refuses to use the term “War on Terror” but operates under the same legal authorities.” *Id.* at 353.

⁸ Debra M. Strauss, *Reaching Out to the International Community: Civil Lawsuits as the Common Ground in the Battle Against Terrorism*, 19 DUKE J. COMP. & INT'L L. 307 (2009) (arguing for a new legal framework to combat terrorism based on civil litigation).

more robust tool of military force⁹ against all those “nations, organizations, or persons”¹⁰ that the President determined had “planned, authorized, committed, or aided the terrorist attacks”¹¹ against the United States on September 11, 2001. While other States around the world did not use a law of war model to deal with al-Qa’eda or similar terror groups, the rise of the mega-Islamic terror groups did prompt them to alter their domestic criminal statutes. England, for example, amended its criminal code to allow for the detention of suspected “terrorists” for up to 28 days without bringing criminal charges.¹² This was done to provide law enforcement the legal right to stop and hold those suspected of planning a terror plot even if the hard evidence was lacking at the time of detention.

Although much has been written on the legal and policy issues surrounding the use of the law of war as a legitimate tool against certain terror groups, perhaps the best weapon against international terrorism, civil litigation against the State that sponsors or supports terrorism is still an emerging concept.¹³ Given the fact that large scale terror groups like

⁹ Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006). “An Act to authorize trial by military commission for violations of the law of war, and for other purposes.” *Id.* The United States also used other law of war tools such as trial by military commissions to prosecute alleged war criminals associated with al-Qa’eda and Taliban forces for violations of the law of war. *Id.* at 2601. *See also* Military Commissions Act of 2009, H.R. REP. NO. 2647-385, at 386 (2009).

¹⁰ Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

¹¹ *Id.*

¹² Terrorism Act 2006 (U.K.), available at http://www.opsi.gov.uk/acts/acts2006/ukpga_20060011_en_1. “An Act to make provision for and about offences relating to conduct carried out, or capable of being carried out, for purposes connected with terrorism; to amend enactments relating to terrorism; to amend the Intelligence Services Act 1994 and the Regulation of Investigatory Powers Act 2000; and for connected purposes.” *Id.*

¹³ Jack D. Smith & Gregory J. Cooper, *Disrupting Terrorist Financing with Civil Litigation*, 41 CASE W. RES. J. INT’L L. 65 (2009) (discussing the development of the concept of civil litigation and the promise of disrupting terrorism).

Hezbollah, al-Qa'eda, or Hamas cannot operate effectively without State sponsorship, the purpose of this article is to discuss the acceptance by the world's democratic nations of this potentially superlative legal tool which could be used with great effect not only to deter the terrorism, but to totally eviscerate many of the most visible terror groups such as Hamas and Hezbollah. In other words, apart from what any particular State may or may not do to address terrorism as a criminal or law of war issue, one response that the terrorist group and, more importantly, the State that sponsors or supports the terrorist group, will always understand is targeting and draining its financial assets. Recognizing that the "democracies of the world are financial and economic superpowers"¹⁴ that actually control large chunks of economic capital from all nations, a legal avenue for victims of terror to receive compensation via civil litigation would serve as a vital and necessary means to deny resources to terrorist organizations and at the same time punish the State-sponsor. Such a legal tool would certainly act as a powerful deterrence against those nations who sponsor terrorist groups by making it "unprofitable to engage in support of terrorist activities."¹⁵

Unfortunately, while the United States has established several legal avenues for civil litigation by private citizens of terror attacks against States that sponsor terrorism, a major stumbling block in terms of effectiveness rests in the reality that fellow democratic nations in the international community refuse to honor or *domesticate* the monetary judgments of American courts. Acknowledging that there are a plethora of political and legal obstacles associated with establishing a workable mechanism for fellow democracies to enforce the "terror" judgments of American courts, one reason that is often raised by critics is the strong objection to the matter of

¹⁴ JOHN NORTON MOORE, *Civil Litigation Against Terrorism: Neglected Promise*, in LEGAL ISSUES IN THE STRUGGLE AGAINST TERROR 197, 200 (John Norton Moore & Robert F. Turner eds., Carolina Academic Press 2010).

¹⁵ JOHN F. MURPHY, *Civil Lawsuits as a Legal Response to International Terrorism*, in CIVIL LITIGATION AGAINST TERRORISM 37, 61 (John Norton Moore ed., Carolina Academic Press 2004).

American punitive monetary awards, a concept that is rejected by most of the world's democratic legal systems. The answer to the aversion towards punitive damages can be remedied by substituting the more widespread acceptance of compensatory damages. Accordingly, any future effort to establish a legal framework to energize democracies to enforce American judgments should be predicated solely on compensation. Hopefully, as more nations come to understand the American concept of just compensation, the establishment of a viable international agreement will occur.

II. TERRORISM

It is sometimes said that terrorism is a mindless and irrational activity. This conclusion is absolutely false. The reality of modern terrorism is the exact opposite. Terrorism is the premeditated use of unlawful violence calculated to, as the old Chinese saw relates, "kill one and frighten ten thousand."¹⁶ Unfortunately, all too often, this strategy of intimidation, death, and resulting fear used by the terrorists pays off when those who are attacked are perceived as capitulating to the terrorists' demands. The outcome of the elections in Spain following the 2004 train bombings in Madrid is a clear example of how the actions of terrorists can cause the citizens of a target nation to acquiesce to the demands of terrorists.¹⁷

Perhaps the greatest inadequacy of the international community in terms of dealing with terrorism rests in an inability to agree as to what constitutes terrorism. Radical Islamic terrorism is a global problem and yet the international community has been absolutely unable to adopt an accepted international definition of terrorism. Even the former Secretary General of the United Nations, Kofi Annan's, 2005 definition was rejected because a large block of Islamic

¹⁶ See SUN-TZU, *THE ART OF WAR* (Ralph D. Sawyer, trans., 1994).

¹⁷ Human Rights Watch, *Setting an Example? Counter-Terrorism Measures in Spain*, 16-17, available at <http://www.hrw.org/en/reports/2005/01/26/setting-example-0> (2005).

nations wanted an exception for wars of national liberation.¹⁸ Ignoring the “cause,” Annan’s entirely reasonable definition echoed the Geneva Conventions’¹⁹ definition of a war crime. “[A]ny action constitutes terrorism if it is intended to cause death or serious bodily harm to civilians or non-combatants, with the purpose of intimidating a population or compelling a Government or an international organization to do or abstain from doing any act.”

Like other nations around the world, the United States has developed its own definitions regarding terrorism. In fact, there are a number of domestic definitions of terrorism that can be found in various federal criminal statutes and legislation.²⁰ The most recent effort to define terrorism is

¹⁸ Serge Schmemmann, *Man in the News; UN's Candid Reshaper--Kofi Atta Annan*, N.Y. TIMES, Oct. 13, 2001, available at <http://www.nytimes.com/2001/10/13/international/13ANNA.html>.

¹⁹ *Id.* The central international treaty dealing with the law of war or the law of armed conflict is the 1949 Geneva Convention. International Committee of the Red Cross (ICRC), *The Geneva Conventions of 1949*, available at

<http://www.icrc.org/web/eng/siteeng0.nsf/html/genevaconventions> (2009). The Geneva Conventions are set out in four categories: (1) Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 75 U.N.T.S. 31; (2) Geneva Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 75 U.N.T.S. 85; (3) Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135; and (4) Geneva Convention Relative to the Protections of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287. *Id.*

²⁰ See, e.g., 28 C.F.R. §0.85 (2010) (asserting that there are numerous Federal statutes that offer slightly different definitions of terrorism). The Department of Justice defines terrorism as “the unlawful use of force and violence against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof, in furtherance of political or social objectives.” *Id.*

(1) the term “international terrorism” means activities that—

(A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State;

found at § 411 of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (hereinafter “USA/PATRIOT Act”) Act of 2001,²¹ which provides definitions for “terrorist organization,” “domestic terrorism,” and “international terrorism.”²² A terrorist organization is defined as one that is:

- (1) Designated by the Secretary of State as a terrorist organization under the process established under current law;
- (2) Designated by the Secretary of State as a terrorist organization for immigration purposes; or
- (3) A group of two or more individuals that commits terrorist activities or plans or prepares to commit (including locating targets for) terrorist activities.”²³

International terrorism is set out in the Act as follows:

International terrorism involves violent acts or acts dangerous to human life that violate the

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- (B) appear to be intended—
 - (i) to intimidate or coerce a civilian population;
 - (ii) to influence the policy of a government by intimidation or coercion; or
 - (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and
 - (C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum

18 U.S.C. § 2331 (2009) (offering a slightly different definition of international terrorism).

²¹ Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 [USA PATRIOT ACT], Pub. L. No. 107-56, 115 Stat. 272 (2001).

²² *Id.*

²³ *Id.*

criminal laws of the United States or any state, or that would be a criminal violation if committed within the jurisdiction of the United States or any state. These acts appear intended to intimidate or coerce a civilian population, influence the policy of a government by intimidation to coercion, or affect the conduct of a government by assassination or kidnapping. International terrorist acts occur outside the United States or transcend national boundaries in terms of how terrorists accomplish them, the persons they appear intended to coerce or intimidate, or the place in which the perpetrators operate.²⁴

In summary, if the international community cannot even agree on how to define terrorism, it is highly unlikely that the United Nations will move very far or fast to develop new legal foundations to confront the problem head-on. Thus, it rests on individual democracies to craft the necessary treaties and agreements to move forward in the fight against international terrorism.

III. UNITED STATES CIVIL LITIGATION LAW AGAINST TERRORISM

American law recognizes two major types of legal activity in the realm of civil liability lawsuits regarding acts of terrorism. The first relates to so-called “premises liability” lawsuits which are typically brought by victims of an act of terrorism against an “affected target” of terrorism, e.g., a business entity. The second category relates to lawsuits directed against those individuals, groups, or States (or State agents) that commit, support, or sponsor a terrorist attack. This discussion concerns the second category of civil litigation.

Monetary damages associated with civil actions against terrorists and their sponsors serve as a key ingredient in

²⁴ *Id.*

combating international terrorism and fulfill United Nations Security Council Resolution 1368 (issued in the wake of the terror attacks of September 11, 2001): “[T]he international community [must] redouble their efforts to prevent and suppress terrorist acts”²⁵ Even prior to the coordinated terror attacks of September 11, 2001, which killed 3,000 people and caused billions of dollars in property loss, the United States government recognized the threat of international terrorism and the need to provide solid legal mechanisms for American terror victims to file private causes of action against both those who commit international acts of terror and those who contribute to those attacks, either directly or indirectly. In addition to providing an avenue for victims of terror to receive compensation, the United States also understood that civil litigation, if used effectively, would certainly serve as a critical and necessary means of deterrence against terrorist organizations as well as those nations who sponsor terrorist groups. For this reason, Congress expressly directed retroactive application of the Antiterrorism and Effective Death Penalty Act of 1996 (hereinafter “AEDPA”), 8 U.S.C. § 1189, so that the law applied to any cause of action arising before or after the enactment of the AEDPA.²⁶

²⁵ S.C. Res. 1368, ¶ 4, U.N. Doc. S/RES/1368 (Sept. 12, 2001). “*Unequivocally condemns* in the strongest terms the horrifying terrorist attacks which took place on 11 September 2001 in New York, Washington, D.C. and Pennsylvania and regards such acts, like any act of international terrorism, as a threat to international peace and security.” *Id.* at ¶ 1.

²⁶ Antiterrorism and Effective Death Penalty Act, 8 U.S.C. § 1189 (1996).

(1) In general. The Secretary is authorized to designate an organization as a foreign terrorist organization in accordance with this subsection if the Secretary finds that—

- (A) the organization is a foreign organization;
- (B) the organization engages in terrorist activity (as defined in section 212(a)(3)(B) [8 USCS § 1182(a)(3)(B)]); and
- (C) the terrorist activity of the organization threatens the security of United States nationals or the national security of the United States.

In tandem with subsequent federal statutes dealing with terrorism civil lawsuits, this model ensures that terrorists and their supporters suffer significant financial punishment which functions both as a direct deterrence and as a disabling mechanism—the very core of the intent of punitive damages. Clearly, in the American justice system, the essence of punitive damages is to award the plaintiff(s) a significant money judgment in addition to actual damages against those defendants who acted with recklessness, intentional malice, or deceit. The wrongdoer is penalized by means of punitive damages in order to both deter future wrongdoing and to make a clear example to others.²⁷ Nowhere is this context more applicable than in the sphere of curtailing international terrorism. Paradoxically, however, it is this provision that presents a stumbling block for other democracies to join as full partners in any agreements to honor such judgments.

In the United States, civil litigation²⁸ can be brought against one of three categories of international terrorists and their sponsors: (1) purely non-State actors, individuals as well as groups; (2) States that sponsor terrorism, or their agents (hereinafter “Flatow Amendment”);²⁹ or (3) State actors committing acts of terrorism outside of their official capacity, so-called non-FSIA (Foreign Sovereign Immunities Act) defendants.³⁰ Currently, under American jurisprudence, two main federal statutory frameworks exist: (1) the Flatow Amendment to the Foreign Sovereign Immunities Act (hereinafter “FSIA”), 28 U.S.C. § 1605; and (2) the Antiterrorism Act (hereinafter “ATA”), 18 U.S.C. § 2333. The so-called Flatow Amendment provides that a foreign official of a designated State sponsor of terrorism, while acting within the scope of his office, can be civilly liable in

²⁷ See, e.g., BLACK’S LAW DICTIONARY 418 (8th ed. 2004).

²⁸ The use of civil litigation as a deterrent to the proscription of torture predates terrorism. Acknowledging that the practice of torture would continue unless deterred, the 1984 case of *Filartiga v. Pena-Irala*, awarded punitive damages of no less than \$5,000,000.00 to the father and sister of Joelito Filartiga, who was tortured to death by Paraguayan officials. See *Filartiga v. Pena-Irala*, 577 F. Supp. 860 (E.D.N.Y. 1984).

²⁹ Judiciary & Judicial Procedure, 28 U.S.C. § 1605A (2008).

³⁰ *Id.*

an American court for violation of acts contained within the legislation. Further, as part of the 2008 Defense Authorization Act,³¹ Congress made it crystal clear that 1996 FSIA Amendments applied a statutory cause of action against the actual State that sponsored the terrorist act.³² Similarly, the ATA allows for private citizens to bring lawsuits for acts of international terrorism with the added deterrent goal of making it unprofitable for terrorists to solicit or maintain financial assets within the United States.³³

Added to the FSIA in 1996, the Flatow Amendment is codified at 28 U.S.C. § 1605A, creating an exception to foreign sovereign immunity in civil suits “in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources [as defined in section 2339A of Title 18] for such an act if such act or provision of material support is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency”³⁴ or other terrorist acts. Although this exception applies only if the defendant foreign State was designated as a State sponsor of terrorism at the time the alleged acts occurred, the issue of punitive damages remains in all terrorism civil lawsuits. Specifically, § 1605A(c) authorizes the full range of money damages which “may include economic damages, solatium, pain and suffering, and punitive damages.”³⁵ The Flatow Amendment provides that:

A foreign state that is or was a state sponsor of

³¹ See National Defense Authorization Act, Pub. L. No. 110-181, § 1083 (2008).

³² See *Cicippio-Puleo v. Islamic Republic of Iran*, 353 F.3d 1024 (D.C. Cir. 2004). The 2008 Amendment was in response to this ruling in which the court held that suit could not be brought against the State. *Id.* at 1036.

³³ For an excellent overview of American approaches in the law see National Security, 43 INT’L L. 929 (2009).

³⁴ Judiciary & Judicial Procedure, 28 U.S.C. § 1605A(a)(1) (2008).

³⁵ 28 U.S.C. § 1605A(c).

terrorism as described in subsection (a)(2)(A)(i), and any official, employee, or agent of that foreign state while acting within the scope of his or her office, employment, or agency, shall be liable to (1) a national of the United States . . . or (4) the legal representative of a [United States national] for personal injury or death caused by acts described in subsection (a)(1) of that foreign state, or of an official, employee, or agent of that foreign state, for which the courts of the United States may maintain jurisdiction under this section for *money damages [which] may include economic damages, solatium, pain and suffering, and punitive damages* [emphasis added].³⁶

In *Flatow v. Islamic Republic of Iran*,³⁷ which dealt with a suicide bomber terror attack on a bus in the Gaza Strip in 1995, the federal court recognized that special compensatory and punitive damages were legitimate deterrence considerations since terrorism was directed not just at the immediate victims, but also at their family members and the society as a whole. Again, the goal of the terrorist is to “kill one and frighten ten thousand.”³⁸

The malice associated with terrorist attacks transcends even that of premeditated murder. The intended audience of a terrorist attack is not limited to the families of those killed and wounded or even just Israelis, but in this case, the American public, for the purpose of affecting United States government support for Israel and the peace process. The terrorist’s intent is to strike fear not only for one’s own

³⁶ *Id.*

³⁷ *Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1, 20–33 (D.D.C. 1998).

³⁸ See *supra* note 16 and accompanying text.

safety, but also for that of friends and family, and to manipulate that fear in order to achieve political objectives. Thus the character of the wrongful act itself increases the magnitude of the injury. It thus demands a corresponding increase in compensation for increased injury.³⁹

In the context of punitive damages, the matter of deterrence is a central component because the goal of punitive damages is to create within the minds of those organizations and nations that sponsor terror and torture the realistic expectation of seizure and dissemination of assets in the form of large monetary damages against them. The court in *Flatow*, the case which directly prompted Congress to create a new statutory cause of action, set out the standard approach in regard to calculating punitive damages:

Factors which may be considered in determining an appropriate amount of punitive damages may be grouped under a few broad headings, including: (1) the nature of the act itself, and the extent to which any civilized society would find that act repugnant; (2) the circumstances of its planning; (3) Defendants' economic status with regard to the ability of Defendants to pay; and (4) the basis upon which a Court might determine the amount of an award reasonably sufficient to deter like conduct in the future, both by the Defendants and others.⁴⁰

Expert testimony in *Flatow* also led to a standard calculation in awarding punitive damages in an amount of three times the amount that the State which sponsors terrorism (in this case Iran) spends annually on terrorist

³⁹ *Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1, 30 (D.D.C. 1998).

⁴⁰ *Id.* at 33.

activities. In *Flatow*, this multiplier produced a \$300,000,000 punitive damages award. Again, under such a calculation punitive awards of this magnitude are designed to: (1) deter State sponsors of terrorism, and (2) affect the ability of such nations to fund terrorist activities in the future.

In *Doe v. Rafael Saravia*,⁴¹ the court listed a string of similar cases which awarded amounts ranging from \$4,000,000 to \$35,000,000 in punitive and compensatory damages. The court in *Doe* noted:

These decisions have awarded damages on the basis of the following factors: i. Brutality of the act; ii. Egregiousness of defendant's conduct; iii. Unavailability of criminal remedy; iv. International condemnation of act; v. Deterrence of others from committing similar acts; vi. Provision of redress to plaintiff, country and world.⁴²

In *Acree v. Republic of Iraq*, the U.S. District Court for the District of Columbia not only reiterated the validity of punitive damages as a deterrence tool, it saw fit to award compensatory and punitive damages totaling over \$959,000,000.⁴³ In *Acree*, 17 American prisoners of war (hereinafter "POWs") during the 1991 Gulf War and their immediate family members sued the Republic of Iraq, its president, and its intelligence service, seeking compensatory and punitive damages for injuries suffered as a result of torture inflicted on the POWs while in Iraqi captivity between January and March 1991. In 2003, the District Court granted default judgment for the plaintiff POWs. In their complaint, "the POW plaintiffs described brutal and inhumane acts of physical and psychological torture suffered during their captivity, including severe beatings, starvation, mock

⁴¹ *Doe v. Rafael Saravia*, 348 F. Supp. 2d 1112, 1158–159 (E.D. Cal. 2004).

⁴² *Id.* at 1159.

⁴³ *Acree v. Republic of Iraq*, 271 F. Supp. 2d 179, 224–25 (D.D.C. 2003).

executions, dark and unsanitary living conditions, and other violent and shocking acts.”⁴⁴

The POW plaintiffs alleged that the acts of torture set forth in their complaint constituted “traditional torts of assault, battery and intentional infliction of emotional distress,” and requested full compensatory and punitive damages for each of the 17 POW plaintiffs and their family members. On July 7, 2003, the court entered final judgment in favor of the plaintiffs. Based on extensive findings of fact regarding the specific injuries suffered by each plaintiff, the federal district court awarded compensatory and punitive damages to all of the POW plaintiffs and their family members, totaling just under one billion dollars.

Unlike the FSIA, the ATA does not specify what type of damages may be awarded. Further, the ATA does not clearly define the class of potential plaintiffs. Nevertheless, by allowing the “estate, survivors, or heirs” of a U.S. national killed by an act of terrorism to sue in federal district court and to recover treble damages and attorney’s fees,⁴⁵ it is certain that the intent of the law is to maximize the punishment of the wrongdoer so that it is *punitive* in nature. In American jurisprudence, the purpose of allowing for treble damages is always punitive in nature and designed to “punish past, and to deter future, unlawful conduct.”⁴⁶ The court used a treble damages formula in assessing damages against Iran. This approach is now standard.

In *Eisenfeld v. Islamic Republic of Iran*,⁴⁷ a case involving a 1996 Iranian State-sponsored act of terrorism carried out by the terror organization Hamas where a bus was bombed in Jerusalem, the court cited the *Flatow* punitive damages approach and awarded the two plaintiff decedents’ estates a single award of \$300,000,000 (\$150,000,000

⁴⁴ *Acree v. Republic of Iraq*, 370 F.3d 41, 44 (C.A.D.C. 2004).

⁴⁵ Crimes & Criminal Procedure, 18 U.S.C. § 2333(a) (1991).

⁴⁶ *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 639 (1981).

⁴⁷ *Eisenfeld v. Islamic Republic of Iran*, 172 F. Supp. 2d 1, 3–9 (2000).

each).⁴⁸ In *Boim v. Quranic Literacy Institute and Hold Land Foundation for Relief and Development*,⁴⁹ the parents of a U.S. citizen murdered in a terror attack in Israel by the terrorist group Hamas sued several individuals and organizations for the loss of their son. They were awarded damages using the treble damages formula.

Civil damages in terrorism cases provide one of the most effective tools imaginable in deterring international terrorism. Indeed, the provision of monetary damages against any wrongdoer along the causal chain of international terrorism can help drain the swamps where terrorism breeds. Under the FSIA and ATA, plaintiffs may expect to level judgments in the tens or hundreds of millions of dollars against those renegade States who sponsor terrorism. The twin aims of fully compensating victims and significantly punishing the financial capabilities of terrorist sponsors form the basis for these judgments. Under the American viewpoint, the egregious nature of international terrorism demands that all courts in all nations assess civil damages at the highest possible levels. As the court stated in *Flatow*: "As terrorism has achieved the status of almost universal condemnation, as have slavery, genocide, and piracy, the terrorist is the modern era's *hosti humani generis*—an enemy of all mankind. . . ."⁵⁰

Despite the development of the current American terrorism jurisprudence, all is not well. The inability of victims to recover damages once they are awarded judgment in court stands as a major distorter of justice and deterrence. In some instances, Iran, the most notorious State-sponsor of terrorism, has removed or hidden assets from the reaches of

⁴⁸ See also *Jenco v. Islamic Republic of Iran*, 154 F. Supp. 2d 27, 39 (D.D.C. 2001) (awarding \$300,000,000 in punitive damages against Iran's Ministry of Information and Security); *Elahi v. Islamic Republic of Iran*, 124 F. Supp. 2d 97, 114 (D.D.C. 2000) (awarding punitive damages of \$300,000,000 against Iran's Ministry of Information and Security); *Anderson v. Islamic Republic of Iran*, 90 F. Supp. 2d 107, 114 (D.D.C. 2000) (awarding punitive damages of \$300,000,000 against Iran's Ministry of Information and Security).

⁴⁹ *Boim v. Quranic Literacy Institute*, 291 F.3d 1000, 1001 (7th Cir. 2002).

⁵⁰ *Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1, 23 (D.D.C. 1998).

American law.⁵¹ In other instances, the executive branch of the U.S. government has served to block recovery of assets under the notion that the Executive needs the flexibility to conduct foreign affairs.⁵²

IV. PUNITIVE DAMAGES V. COMPENSATORY DAMAGES

University of Virginia School of Law international law expert, Professor John Norton Moore strongly advocates that all nations adopt a strong legal model for civil lawsuits that incorporates significant punitive damages: "It is strongly in our interest to have every nation on earth copy the 1996 FSIA amendments."⁵³ Nevertheless, Moore recognizes that punitive damages are not palatable to most civil law nations and poses a significant hurdle to developing a consensus that would truly hold renegade nations accountable for acts of terrorism committed by them or their agents.⁵⁴ Adopting an American-styled deterrence model that not only provides for citizens to be compensated for acts of terror, but also brings with it the hammer of punitive damages is simply unrealistic. If real progress is to be made toward creating a global legal framework which can act to effectively suppress the scourge of international terrorism the concept of punitive damages must be framed within the parameters of compensatory damages.

⁵¹ Gabriel C. Lajeunesse, *In Search of Justice: Increasing the Risk of Business with State Sponsors of Terror*, 108 MICH. L. REV. 19 (2009) (discussing how Iran is able to hide its assets so that they cannot be attached).

⁵² See *Acree v Republic of Iraq*, 370 F.3d 41, 50 (C.A.D.C. 2004). (overturning an award to plaintiffs based in part on the Executive Branch's contention that the court interfered with the conduct of U.S. foreign policy).

⁵³ JOHN NORTON MOORE, *Introduction*, in CIVIL LITIGATION AGAINST TERRORISM 3, 15 (John Norton Moore ed., Carolina Academic Press 2004).

⁵⁴ *Id.* at 7 n.5. Every state on the Department of State terrorism list is a nondemocratic nation and, certainly, the Taliban and Al Qaeda share this same anti-democratic structure. Further, there is reason to believe the tone of the principal factors in the aggressiveness of nondemocratic decision elites is their ability to reap the benefit of actions they order while imposing or "externalizing" the costs on others. *Id.*

In short, even if punitive damages have to be discarded in any attempt to develop a workable model for other democracies to honor judgments rendered by fellow democracies in terror cases, American precedents in setting damage awards under compensatory concepts would still produce meaningful and effective remedies. Since legal cases involving acts of terror have parallels in common law wrongful death and injury lawsuits, a brief overview of American judgments in these areas reveals that there is still significant *punch* in the compensatory arena. A reasonable pragmatic approach in dealing with compensatory damage awards would still act as a deterrent to States that support terrorism. Although the compensatory judgments are certainly not large *vis a vis* punitive damages, a flood of lawsuits wait hungrily at the door for satisfaction and would certainly make up for the discrepancy in short order.

Despite the perception that American courts grant exorbitant awards in wrongful death cases, the amount of compensatory damages in most instances is both practical and reasonable. Even in what can be considered high-profile cases, the awards granted reflect a judicious approach in terms of just compensation for the wrongs inflicted. Four examples illustrate this point. First, a 2004 wrongful death civil lawsuit from a Texas State court dealt with a wrongful death claim where a wife killed her suspected cheating husband by intentionally hitting him with her car and then running the vehicle over his body multiple times. The parents of the victim sued the woman for wrongful death and received \$1,858,750 each for pecuniary losses, loss of companionship, and mental anguish.⁵⁵

Second, in perhaps the most infamous wrongful death suit in the history of the United States, the verdict against O.J. Simpson, though totaling \$33.5 million, awarded compensatory damages equaling only \$8.5 million. A jury found that defendant Orenthal James (O.J.) Simpson

⁵⁵ Harris v. Harris, No. 2004-37461 (281st Dist. Ct., Harris County, Tex. Feb. 9, 2007).

committed these homicides willfully and wrongfully, with oppression and malice.⁵⁶

Third, in *Rux v. Republic of Sudan*, the case of the surviving family members of American sailors killed in the 2000 al-Qa'eda terror attack on the U.S.S. Cole, in Yemen, a Virginia federal judge granted an award just under \$8 million dollars.⁵⁷ This civil action lawsuit claimed wrongful death, intentional infliction of emotional distress, and violations under the Foreign Sovereign Immunities Act and the Death on the High Seas Act⁵⁸ against the Republic of Sudan. The family members claimed that the Republic of Sudan was liable for damages from the attack of the U.S.S. Cole in the Port of Aden, Yemen, because it provided material support and assistance to al- Qa'eda, the terrorist organization behind the attack. The compensatory award was split between 33 family members, with the amounts ranging from \$471,327 to \$117,418 each.⁵⁹

The final example returns to the most often cited American case dealing with compensatory damages, *Flatow v. Islamic Republic of Iran*,⁶⁰ which dealt with a suicide bomber terror attack on a bus in the Gaza Strip in 1995. *Flatow*, and a line of cases following *Flatow*, set out valuable considerations associated with the long standing concept of compensatory damages in common law tort which are designed to compensate not just the immediate family of the victims, but also more remote family members. The *Flatow* court found that the vicious nature of terrorism inflicts a unique harm which is reflected in the resulting compensatory damages.

The malice associated with terrorist attacks transcends even that of premeditated murder. The intended audience of a terrorist attack is not limited to the families of those killed and

⁵⁶ *Rufo v. Simpson*, 86 Cal. App. 4th 573, 581 (2001).

⁵⁷ *Rux v. Republic of Sudan*, 461 F.3d 461, 466 (4th Cir. 2006).

⁵⁸ *Id.* at 466–77.

⁵⁹ *Id.* at 469.

⁶⁰ *Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1, 20 (D.D.C. 1998).

wounded or even just Israelis, but in this case, the American public, for the purpose of affecting United States government support for Israel and the peace process. The terrorist's intent is to strike fear not only for one's own safety, but also for that of friends and family, and to manipulate that fear in order to achieve political objectives. Thus the character of the wrongful act itself increases the magnitude of the injury. It thus demands a corresponding increase in compensation for increased injury.⁶¹

The victim's family in *Flatow* was allowed to recover compensatory damages for economic loss, pain and suffering, and solatium. The court calculated economic damages by adding the funeral bill of \$4,470.00 with the loss of accretions to the estate in the amount of \$1,508,750.00. The calculation for loss of accretions took into account inflation, rise in productivity, job advancement, and net earnings. Furthermore, the court awarded \$1,000,000 for the three to five hours of pain and suffering the victim endured after the terrorist attack before she died.

The *Flatow* decision is also noted for its increased award of solatium damages which account for the additional suffering caused by the family members of a victim to a terrorist act. The court noted that "mental anguish, bereavement and grief resulting from the fact of decedent's death constitutes the preponderant element of a claim for solatium."⁶² The court then divided its solatium inquiry into determining: (1) the mental anguish suffered by the victim's family, and (2) the loss of decedent's society and comfort. Calculations for both of these damage types are fact intensive and not subject to exact models associated with economic loss.

Two main factors guided the analysis for both damage types: (1) the expected duration of the mental anguish, and

⁶¹ *Id.* at 30.

⁶² *Id.*

(2) the nature of the relationship between the claimant and decedent. Since all acts of terrorism employ unlawful violence, the anguish of family members is prolonged well beyond what is experienced for a natural death. In turn, a more intimate family connection calls for greater levels of compensation for the victim's family member. Again, *Flatow* provides a superb standardized rubric for compensatory damages calculation.

Numerous factors enter into this analysis, including: strong emotional ties between the claimant and the decedent; decedent's position in the family birth order relative to the claimant; the relative maturity or immaturity of the claimants; whether decedent habitually provided advice and solace to claimants; whether the claimant shared interests and pursuits with decedent; as well as decedent's achievements and plans for the future which would have affected claimants.⁶³

The inner details of any heir, parent, or sibling's relationship with the deceased may be uncovered to construct an accurate picture of the loss suffered. Another statement of similar factors was given for solatium in *Kerr v. Islamic Republic of Iran*:

(1) whether the decedent's death was sudden and unexpected; (2) whether the death was attributable to negligence or malice; (3) whether the claimants have sought medical treatment for depression and related disorders resulting from the decedent's death; (4) the nature (*i.e.* closeness) of the relationship between the claimant and the decedent; and (5) the duration of the claimant's mental anguish in excess of that which would have

⁶³ *Id.* at 31–32.

been experienced following the decedent's natural death."⁶⁴

Rooted in a common law tort framework, the ATA has no specific requirement that those recovering be citizens of the United States themselves (the statute provides no definition for "survivors" or "heirs"), nor does it specify the types of damages. Nevertheless, in light of legislative history and developing case law, the 2004 case of *Ungar v. Palestinian Authority*, sets the accepted methodology in determining these matters.⁶⁵ Yaron Ungar and his wife were killed in a drive-by shooting by terrorists on June, 9, 1996, in Israel. Yaron's family brought suit under the ATA against multiple defendants including the Palestinian Authority. The district court found that Yaron's parents and siblings qualified to bring suit as "survivors" under the wording of 18 U.S.C. § 2333(a), since Congress intended to use common law tort principles to extend civil liability to terrorist acts with the widest possible effect. The use of the term "survivors" evidences the intent that immediate family members, other than heirs, may seek compensation for the loss of a loved one. Indeed, allowing siblings and parents of those killed by terrorists to recover damages serves as an additional deterrence factor to terrorism.

In reference to the issue of damages, *Ungar* held that the primary purpose of the law was to empower the victims of terrorism to the fullest extent possible. Accordingly, *Ungar* allowed for the full range of damages set out under the FSIA. Ungar's two children (heirs), parents, and siblings were all awarded damages for loss of society and companionship. The children also recovered for loss of parental guidance and parental services which Ungar could no longer provide. "These services include such tasks as babysitting, feeding, bathing, doing the laundry, getting them ready for school, and similar assistance normally performed by a parent for a

⁶⁴ *Kerr v. Islamic Republic of Iran*, 245 F. Supp. 2d 59, 64 (D.D.C. 2003).

⁶⁵ *Estates of Ungar ex rel. Strachman v. Palestinian Authority*, 304 F. Supp. 2d 232 (D.R.I. 2004).

child.”⁶⁶ Economic damages will ordinarily include loss of earnings and funeral costs. Similar to *Flatow*, where the court considered inflation, rise in productivity, job advancement, and net earnings in its calculations of lost earnings, the Ungar family recovered lost earnings subject to Ungar’s personal consumption.

Understanding that no rigid formula exists for computing damages associated with pain and suffering, the *Ungar* court heard expert testimony giving a step-by-step analysis of the drive-by shooting to accurately determine damages for pain and suffering. The court considered in its calculation the fact that Ungar suffered painful bullet wounds in his arm and chest before being killed by a head shot while slumped in his car seat, as well as the mental pain Ungar experienced at seeing his wife’s death shortly before his own. The court awarded \$500,000 for the pain and suffering. In addition, Ungar’s family received losses for mental anguish (solatium) which were calculated in a similar fashion to loss of society. Ungar’s children, parents and three siblings received a total of \$38,803,401 in compensatory damages for all the above mentioned losses.

*Jenco v. Islamic Republic of Iran*⁶⁷ provides additional guidance for appropriate compensatory damages. Father Lawrence M. Jenco was a Catholic priest working in Beirut, Lebanon when he was taken hostage by the terrorist organization Hezbollah. After a year and a half of maltreatment he was released. Father Jenco and his family sued Hizbollah and the government of Iran which funds the terrorist organization. Father Jenco recovered for torts of battery, assault, false imprisonment, and intentional infliction of emotional distress. The court broke with traditional doctrine when it allowed Father Jenco’s immediate family to recover for intentional infliction of emotional distress although they were not physically present to see the outrageous and abusive conduct of his captors. The *Jenco* court referenced the reasoning of the court in *Sutherland v.*

⁶⁶ *Id.* at 274.

⁶⁷ *Jenco v. Islamic Republic of Iran*, 154 F. Supp. 2d 27 (D.D.C. 2001).

The Islamic Republic of Iran, which stated that “when an organization takes someone hostage, it is implicitly intending to cause emotional distress among the members of that hostage’s immediate family.”⁶⁸ The *Jenco* court also adopted the precedent established in *Cicippio v. Islamic Republic of Iran*,⁶⁹ of awarding ten thousand dollars a day to plaintiffs who were taken hostage. That formula made for a damage award of \$24,540,000 for *Jenco*.

V. PROPOSING AN INTERNATIONAL PROTOCOL FOR CIVIL LITIGATION AGAINST TERRORISM

Many of the world’s civil legal systems differ substantially from the United States’ civil legal system.⁷⁰ Nevertheless, in the realm of compensating victims of terrorism, the American approach has much to contribute. Of paramount importance, the American perspective centers on the desire to provide solid legal mechanisms for American terror victims to file private causes of action against both those who commit international acts of terror and those States who contribute to or stand behind those attacks. As briefly outlined above, in addition to standard tort remedies, the United States has codified traditional tort causes of action in terms of fixed legislation.

The next step in the process of developing civil litigation as a viable tool to fight terror is to propose for adoption a United Nations protocol that will allow State Parties to honor damage awards in terrorism civil litigation suits rendered by other State Parties. In his 2010 book, *Legal Issues in the Struggle Against Terror*, John Norton Moore offers such a draft protocol. Disregarding the punitive damages set out in American legislation, Moore provides the following at proposed Article 11:

⁶⁸ *Sutherland v. The Islamic Republic of Iran*, 151 F. Supp. 2d 27, 50 (D.D.C. 2001).

⁶⁹ *Cicippio v. Islamic Republic of Iran*, 18 F. Supp. 2d 62 (D.C.C. 1998).

⁷⁰ *See, e.g., Gonzales v. Chrysler Corp.*, 31 F.3d 377 (5th Cir. 2002) (comparing the Mexican law caps on wrongful death with American law).

States Parties to this Protocol undertake to honor in their national legal systems judgments rendered by other States Parties under actions established consistent with this Protocol provided;

- A judge of the honoring State Party reviews the foreign judgment and determines that the judgment was fair and consistent with due process of law;
- *No State Party is required to honor damage awards, such as those for punitive damages, which are inconsistent with its own national law; and*
- No attachment or execution shall be permitted against facilities protected by diplomatic or counselor immunity, military assets, or assets held by national central banks [emphasis added].⁷¹

VI. CONCLUSION

The so-called War on Terror requires the use of all available legal tools and the application of the power of the civil justice system represents a vastly underutilized potential of great impact. Understanding that international tort law has been around for centuries, it is imperative that the democracies of the international community take direct steps to capitalize on this essential legal tool as a weapon against terrorist States. Totalitarian regimes like Iran and North Korea are the ones that are guilty of supporting terrorism and have too long been able to conceal huge financial assets within the borders and reach of many of the world's democratic States.

Chief among the arguments against adopting an American-style civil action framework is the concern over

⁷¹ JOHN NORTON MOORE, *Civil Litigation Against Terrorism: Neglected Promise*, in *LEGAL ISSUES IN THE STRUGGLE AGAINST TERROR* 197, 233 (John Norton Moore & Robert F. Turner eds., Carolina Academic Press 2004).

punitive damages. Since punitive damages are generally not available in civil law systems and are very controversial in international practice, a proposed international protocol must limit damages to compensatory only. As discussed under Section V of this article, the use of compensatory damages would still deliver a significant blow to States that sponsor terrorism, particularly if the full range of compensation is provided.

A new United Nations convention on civil causes of action against States that sponsor terrorists would have as its key component an obligation on State parties to enact legislation to permit civil suits and honor the judgments issued by other States. Not only would the civil litigation serve as permanent record of the terror act established by a competent court—an official record of condemnation—the damages awarded would serve as deterrence to the machinations of the State that sponsored the terrorism.

At the end of the day, civil lawsuits are also intended to bring public shame within the international community to those nations who sponsor acts of terror. Since terrorist acts have long been criminalized in every democratically-based legal system as well as in numerous United Nations sponsored conventions,⁷² it is essential that all democracies take the next step and develop a legal framework where the terror judgments of other democracies are given reciprocity.

⁷² G.A. Res. 109, U.N. GAOR, 54th Sess., Supp. No. 49, U.N. Doc A/54/49 (Vol. I) (1999).